Exhibit A
Part 2

SNET was to transform Connecticut's existing infrastructure into a robust, multifunctional core capable of supporting a variety of information, communications and entertainment applications. I-SNET was also intended to supersede the Company's existing infrastructure and address the state's emerging, broadband, communications requirements. In support of I-SNET, the Company stated that the existing telecommunications infrastructure was a contemporary one, capable of providing high quality voice-oriented communications and a variety of existing data communications applications. However, as customer requirements and communications technologies evolved to support other modes of communication, and as industry changes introduced competition and imposed new open-access requirements, it was anticipated that new and varied communications requirements would be imposed on the infrastructure. These functional requirements were addressed by I-SNET and were expected to range from narrowband (for voice and "low-speed" data applications) to broadband (for video and "high-speed" data applications). According to the Company, I-SNET was necessary to meet these requirements and to support those communications services.[56]

As part of I-SNET, the Company was to deploy over 200,000 plant miles of broadband transmission media, comprised of optical fiber and coaxial cable. Statewide deployment of Synchronous Optical Network (SONET) interoffice transport systems, digital switching, Signaling System Number 7 (SS7), Advanced Intelligent Network (AIN) and Integrated Services Digital Network (ISDN) capabilities were also to occur by 1999 that would complement the Company's fiber and coaxial installation. The Company expected that the complete timeframe for this infrastructure deployment would span a time period beginning in 1994 and end in 2009.[57]

Additionally, as part of that plan, the Company's analog and digital switches were to form the backbone of its switching network.[58] During the 1994–1999 time frame, electronic aggregate was to evolve into a streamlined, all digital platform complemented by ISDN-based digital access, SS7 signaling and AIN call control. Further, broadband infrastructure deployment was to begin with: 1) the total migration of the interoffice transport network to a SONET-based digital broadband platform; 2) initial broadband switch deployment (for data and video applications) with AIN-like call control capability; and 3) full deployment of the broadband operations management platform. These activities were also to result in the retirement of: 1) the embedded base of analog switches and asynchronous interoffice transmission systems; 2) significant portions of the embedded base of the digital switching system; 3) asynchronous loop transmission systems; 4) copper loop plant; and 5) an associated variety of common and complementary systems and subsystems.

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based on telephony cost savings alone and that potential video revenues were incremental revenues to the cost savings the Company expected to realize. According to SNET, when conversion to the HFC network was complete, the Company expected that network operating costs would be significantly less per access line than with the twisted copper pair. August 25, 1999 Decision, Docket No. 99-04-02, p. 4.

[56] November 21, 1995 Decision, Docket No. 94-10-03, DPUC Investigation into the Southern New England Telephone Company's Intrastate Depreciation (Depreciation Proceeding), Table B, p. B.

[57] Id.

[58] The Telco's modernization of switches from analog to digital was completed in the fourth quarter of 2001. December 18, 2002 Decision in Docket No. 02-01-19, DPUC Annual Report to the General Assembly on the Status of Telecommunications in Connecticut, p. 15.

Moreover, during the 2000-2004 timeframe, broadband modernization was to continue resulting in expanded broadband access to 84% of Connecticut's access lines. The Company also intended to introduce multimedia (voice, data, video), optimized broadband switching systems in the network, that would leverage and further consolidate the Company's switching consolidation efforts that began in the 1994-1999 timeframe.[59]

Lastly, during the third and final stage, the 2005-2009 timeframe, it was anticipated that the I-SNET deployment would be completed. The Company expected its telecommunications infrastructure to transform to an end-to-end broadband network, capable of providing full service network capabilities to all Connecticut subscribers. The Company also anticipated at the completion of the I-SNET deployment period, that the existing embedded base of copper cable, circuit, switching, computing and associated common and complementary assets would be replaced and retired. During the I-SNET deployment timeframe, the Company's network infrastructure was also expected to evolve from the current 125 switching locations that was comprised of 145 switches to 41 switching locations containing approximately 50 switches. According to the Company, this consolidation would facilitate evolution to a unified, broadband, multi-media network based on SONET transport and Asynchronous Transfer Mode (ATM) switching as defined by the broadband-ISDN architecture.[60]

In the Depreciation Proceeding, the Department determined that it was in the public interest that the Telco be afforded the opportunity to provide business and residential customers the benefits of new telecommunications technologies.[61] The Department also determined that the Company should be provided the necessary assurances that its commitments introduce, where practical, the latest technology available.[62] Accordingly, the Department permitted the Company to include for purposes of depreciation, an allowance for the plant that would be retired due to the I-SNET deployment. This allowance would subsequently be recovered from the Telco's customers.[63]

Furthermore, as part of the Company's approved Alternative Regulation Plan (Alt Reg Plan), the Telco proposed quality of service standards that were based on the Company's expected service performance and its deployment of I-SNET.[64] In the March 13, 1996 Decision in Docket No. 95-03-01, the Department determined that the Telco would, through the implementation of I-SNET, improve productivity and control costs while maintaining the quality of service necessary to retain existing customers and attract new ones. Also during Docket No. 95-03-01, the Telco testified that in the long term, the deployment of HFC facilities would provide various features that could detect and address service degradation before customers experience service problems. The

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[59] November 21, 1995 Decision, Docket No. 94-10-03, Table B, p. C.

[60] Id.

[61] November 21, 1995 Decision, Docket No. 94-10-03, p. 19.

[62] Id.

[63] Id., pp. 19 and 20.

[64] See the March 13, 1996 Decision in Docket No. 95-03-01, Application of the Southern New England Telephone Company for Financial Review and Proposed Framework for Alternative Regulation.

Telco claimed that these HFC facilities would have network surveillance and built-in diagnostic capabilities which could detect points of failure and allow the Company to take the necessary corrective action. Those facilities also possessed the ability to automatically schedule preventive maintenance to ensure service dependability. Consequently, the Telco expected to improve its service quality every year during the deployment of the I-SNET and the HFC network. Accordingly, as part of its approved Alt Reg Plan, the Department employed the Company's service standard objectives in place at that time as a starting point, and over the course of the Alt Reg Plan, increased the minimum objectives based in part on the Telco's expected improvement in service quality resulting from its infrastructure modernization plan.[65]

However, in November 1996, Lucent, the major manufacturer and supplier of HFC components, announced that it would no longer be an HFC vendor. Beginning in 1996 many large telecommunications companies began to retreat from HFC leading to Lucent's abandonment of the HFC technology. The Telco undertook its own HFC review and ultimately decided to continue to deploy the HFC technology. Additionally, in February 1997, the National Electric Safety Code standards subcommittee denied the Company's request for a modification to allow placement of an independent power supply source as part of the fiber strand in the communications gain on telephone poles. The Telco claimed in Docket No. 99-04-02 that it had not found a cost-effective means of providing an independent power supply source and had used commercial power with battery back-up and portable generators. The Telco also stated that while such an arrangement was an acceptable approach for a very small number of customers, it could not be employed for broadscale use.[66]

At about the same time, many of the companies that had begun to deploy the HFC technology started to report that provision of telephone service over an HFC network was not technologically and economically viable. Beginning in 1997, telecommunications companies such as Pacific Bell (now a part of SBC Communications Corporation, Inc. (SBC)), NYNEX, Bell Atlantic, (currently a part of the Verizon Corporation) and Time Warner began to retreat from, and subsequently reject, HFC as a full service network solution. Presently, no incumbent local telephone company, including the Telco, offers both telephony and CATV services over an HFC network.[67]

While no incumbent local telephone company, including the Telco, appears to offer telecommunications services over an HFC network, the clear purpose of I-SNET was to replace the Company's existing infrastructure so that it could provide voice, data and video services to its customers. If successfully deployed, I-SNET and the HFC network would have afforded the Company the ability to offer a full set of telecommunications services effectively and efficiently. The Department finds that in its I-SNET Plan, the Company did not identify or differentiate the facilities that would be used for telecommunications services (i.e., voice and data) and those that would be

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[65] Id., pp. 46 and 47.
[66] August 25, 1999 Decision, Docket No. 99-04-02, p. 5.
[67] Id.

used to support the offering of CATV services.[68] Rather, in accepting the I-SNET plan for purposes of a depreciation allowance and alternative regulation, the Department was led to believe that one network would support a full service offering package.[69]

Therefore, the Department concludes that I-SNET and the HFC network was to be used to support a host of telecommunications (including video) services. Based on the intended use of the HFC network, the Telco sought and was granted favorable regulatory treatment relative to depreciation and alternative regulation. The Department believes that had the HFC network been fully constructed in the manner as envisioned by the Telco in 1994, the Company would be well on its way in offering voice, data and video services over that network.[70] Additionally, it is because of the favorable treatment afforded the Telco, most notably in the Depreciation Proceeding and in Docket No. 95-03-01, that the Department will consider the Petition in light of the SPV Disposition Plan approved in Docket No. 00-08-14 and the recovery of the costs and expenses associated with that network's assets by the Company's shareholders.

C. FEDERAL AND STATE UNBUNDLING REQUIREMENTS

As a result of the Telcom Act and Connecticut Public Acts 94-83, An Act Implementing the Recommendations of the Telecommunications Task Force and 99-122, An Act Concerning Competition in the Telecommunications Industry,[71] certain responsibilities and obligations have been imposed on the Telco in order to promote telecommunications competition. The following analysis discusses in part, those obligations.

1. Telcom Act

Section 251(c)(2) of the Telcom Act imposes on ILECs:

> . . . the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—
> (A) for the transmission and routing of telephone exchange service and exchange access;
> (B) at any technically feasible point within the carrier's network;
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and

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[68] See for example, the November 21, 1995 Decision, Docket No. 94-10-03, Table B, p. D, wherein the Company provided the milestones for its network modernization.

[69] Table B, p. C.

[70] Id, p. D.

[71] Codified at Conn. Gen. Stat. §§16-247a-16-247r (Connecticut Statutes).

> conditions of the agreement and the requirements of this section and section 252.

In addition, §251(c)(3) of the Telcom Act requires ILECs to provide:

> . . . to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

Further, §251(d)(2) of the Telcom Act required the FCC when determining what network elements should be unbundled to consider whether:

> (A) access to such network elements as are proprietary in nature is necessary; and
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

The Telcom Act requires the ILECs to make available to CLECs, access to UNEs at reasonable, nondiscriminatory terms and conditions. This means ILECs must provide carriers with the functionality of a particular element, separate from the functionality of other elements, and must charge a separate fee for each element.[72] The FCC concluded that access to an UNE refers to the means by which requesting carriers obtain an element's functionality in order to provide a telecommunications service. The FCC also indicated that just as §251(c)(2) of the Telcom Act requires interconnection at any technically feasible point, §251(c)(3) of the Telcom Act also requires access be provided at any technically feasible point. Therefore, pursuant to the terms of §§251(c)(2), 251(c)(3) and 251(c)(6) of the Telcom Act, an ILEC's duty to provide access constitutes a duty to provide a connection to a network element independent of any duty imposed by §251(c)(2) of the Telcom Act and that such access must be provided under the rates, terms, and conditions that apply to unbundled elements.[73]

The FCC also addressed the "necessary and impair" standards outlined in §251(d) of the Telcom Act.[74] Specifically, the Commission recognized that §251(d)(2) of the Telcom Act provided the FCC with the ability to not require ILECs to provide access

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[72] CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and CC Docket No. 95-185, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order (FRO), August 8, 1996, ¶265.

[73] Id., ¶269.

[74] Id., ¶279.

to UNEs if for example, access to that particular element was not necessary.[75] In the opinion of the FCC, "necessary" meant that an element was a prerequisite for competition.[76] The FCC also recognized that §251(d)(2)(A) of the Telcom Act permitted the Commission and the states to require the unbundling of additional elements (beyond those identified by the FCC) unless the ILEC could prove to the state commission that the element was proprietary, or contained proprietary information that would be revealed if the element was provided on an unbundled basis; and a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network.[77] The FCC rejected the notion that ILECs need not provide proprietary elements if the requesting carriers could obtain the proprietary element from a source other than the incumbent. According to the FCC, requiring new entrants to unnecessarily duplicate parts of the ILEC's network would generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the Telcom Act.[78]

The FCC further refined its definition of "necessary" within the meaning of §251(d)(2)(A) of the Telcom Act, by considering the availability of alternative elements outside of the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, preclude a requesting carrier from providing the services it seeks to offer. The FCC also concluded that this "necessary" standard differed from the "impair" standard because a "necessary" element would, if withheld, prevent a carrier from offering service, while an element subject to the "impair" standard would, if withheld, merely limit a carrier's ability to provide the services it seeks to offer.[79]

Relative to the impair standard, the FCC believed that an entrant's ability to offer a telecommunications service was diminished in value if the quality of the entrant's service, absent access to the requested element, declined and/or the cost of providing

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[75] Id.

[76] Id., ¶282.

[77] Id., ¶283.

[78] Id.

[79] FCC Docket No. 99-238, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Rel. November 5, 1999 (UNE Remand Order), ¶¶44 and 46. The UNE Remand Order was issued in response to the US Supreme Court's January 1999 decision that directed the FCC to reevaluate the unbundling obligations of §251 of the Telcom Act. According to the FCC, the Supreme Court's decision removed many of the uncertainties surrounding the requirements of §251 of the Telcom Act by upholding the majority of the Commission's rules implementing that section of the act, including its jurisdiction to implement §§251 and 252, the FCC's definitions of network elements, and its rule requiring ILECs to offer combinations of unbundled network elements that are already combined. The Supreme Court also directed the FCC to revise the standards under which the unbundling obligations of §251(c)(3) of the Telcom Act are determined. Specifically, the Supreme Court required the FCC to give some substance to the "necessary" and "impair" standards in §251(d)(2) of the Telcom Act, and to develop a limiting standard that was related to the goals of that act. In addition, as the FCC developed the "necessary" and "impair" standards, the Supreme Court required the Commission to consider the availability of alternative network elements outside the incumbent's network. Id., ¶1.

the service increased. Accordingly, the FCC interpreted this standard to require the Commission and the states, when evaluating unbundling requirements beyond those identified by the FCC, to consider whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the ILEC's network.[80] The FCC also declined to adopt the impairment standard advanced by most Bell Operating Companies (BOC) wherein they must provide UNEs only when the failure to do so would prevent a carrier from offering a service. Additionally, the FCC rejected the related interpretations that carriers are not impaired if they can obtain elements from another source, or if they can provide the proposed service by purchasing the service at wholesale rates from a LEC.[81]

In its UNE Remand Order, the FCC concluded that the failure to provide access to a network element would impair the ability of a requesting carrier to provide the services it seeks to offer if, taking into consideration the availability of alternative elements outside the ILEC's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminished a requesting carrier's ability to provide the services it sought to offer. The FCC also found that a materiality component requires that there be substantive differences between the alternative outside of the incumbent LEC's network and its network element that, collectively, "impair" a CLEC's ability to provide service within the meaning of §251(d)(2) of the Telcom Act. Consequently, the FCC concluded that where a competing LEC's "ability to offer a telecommunications service in a competitive manner is materially diminished in value without access to that element," the competitor's ability to provide its desired services would be impaired.[82]

Finally, the Department notes that §251(d)(3) of the Telcom Act provides the states with independent authority to require unbundling.[83] Specifically, §251(d)(3) of the Telcom Act states:

> PRESERVATION OF STATE ACCESS REGULATIONS- In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—
> (A) establishes access and interconnection obligations of local exchange carriers;
> (B) is consistent with the requirements of this section;

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[80] FRO, ¶285.

[81] Id., ¶286.

[82] UNE Remand Order, ¶51.

[83] The Department is perplexed by the Company's argument in this proceeding that "the Department has no independent state authority to order the Telco to unbundle new network elements." Telco Brief, pp. 7 and 8. The Department questions this statement in light of a filing made in US District Court, wherein the Telco argued that "state commissions such as the Department are permitted under federal law to expand the FCC's list of network elements that must be unbundled." See the July 3, 2001 Complaint for Declaratory and Injunctive Relief, Civil Action No. 301CV01261, The Southern New England Telephone Company, v. Donald W. Downes, et al in their official capacities as Commissioners of the Department of Public Utility Control, p. 6.

and
(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

This was reaffirmed by the FCC when it stated that §251(d)(3) of the Telcom Act grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of §251 of the Telcom Act and the national policy framework instituted in the UNE Remand Order.[84]

2. Triennial Review Order

The FCC has reaffirmed its definition of a network element as requiring ILECs to make available to requesting carriers network elements that are capable of being used in the provision of a telecommunications service.[85] Citing to 47 U.S.C. §153(29),[86] the FCC states that a network element includes features, functions and capabilities that are provided by means of such facility or equipment.[87] The FCC also states that:

> . . . the definition of a network element is ambiguous as to whether the facility must be *actually used by the incumbent LEC* in the provision of a telecommunications service or must be *capable of being used* by a requesting carrier in the provision of a telecommunications service regardless of whether the incumbent LEC is actually using the network element to provide a telecommunications service. We find that, taken together, the relevant statutory provisions and the purpose of the 1996 Act support requiring incumbent LECs to provide access to network elements to the extent those elements are capable of being used by the requesting carrier in the provision of a telecommunications service.[88]

The FCC further states when defining a network element, that to interpret the definition of a "network element" so narrowly as to mean only facilities and equipment used by the ILEC, in the provision of a telecommunications service would be at odds with §251(d)(2) of the Telcom Act and the act's pro-competitive goals. Additionally, providing requesting carriers with access only to those facilities and equipment actually used by the ILEC would lead to such unreasonable results. Finally, the FCC notes that an alternative reading of that statute would allow ILECs to prevent competitors from making new and innovative uses of network elements simply because the ILEC has not yet offered a given service to consumers. The FCC concludes that such a result would

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[84] UNE Remand Order, ¶154.

[85] TRO, ¶58.

[86] 47 U.S.C. §153(29) defines a network element as "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."

[87] Id.

[88] TRO, ¶59.

stifle competitors' ability to innovate and could hinder deployment of telecommunications services.[89]

Relative to "qualifying services," the FCC has determined that in order to gain access to UNEs, carriers must provide qualifying services using the UNEs to which they seek access.[90] The FCC defines "qualifying" as those telecommunications services offered by requesting carriers in competition with those that have been traditionally the exclusive or primary domain of the ILECs. Those services include local exchange service, such as POTS and access services, such as xDSL and high capacity circuits.[91]

Moreover, the FCC finds that once a requesting carrier has obtained access to a UNE in order to provide qualifying service, the carrier may use that UNE to provide any additional services, including non-qualifying telecommunications and information services.[92] The FCC concludes that allowing requesting carriers to use UNEs to provide multiple services on the condition that they are also used to provide qualifying services will permit carriers to create a package of local, long distance, international, information, and other services tailored to the customer.[93]

The FCC again addressed the Necessary and Impair Standard. Specifically, the FCC determined that while the Telcom Act does not offer a definition of "impair," there are a number of possible definitions available for determining when impairment exists. The FCC cites as an example, *barriers to entry*, to examine whether competitors are prevented from entering a particular market.[94] According to the FCC, depending on the circumstances, barriers to entry can come from a variety of factors such as sunken costs, scale economies, scope economies, absolute cost advantages, capital requirements, first-mover advantages, strategic behavior by the incumbent, product differentiation, long-term contracts, and network externalities.[95]

3. Connecticut Statutes

In addition to the authority granted in the Telcom Act, the Department possesses the authority to require the unbundling of the Telco's HFC network pursuant to Conn. Gen. Stat. §16-247b(a). That statute provides in part, that:

> On petition or its own motion, the department shall initiate a proceeding to unbundle the noncompetitive and emerging competitive functions of a telecommunications company's local telecommunications network that are used to provide telecommunications services and which the department determines, after notice and hearing, are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combinations.

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[89] Id., ¶60.
[90] Id., ¶ 135.
[91] Id.
[92] Id., ¶143.
[93] Id., ¶146.
[94] Id., ¶74.
[95] Id., ¶75.

In addition, Conn. Gen. Stat. §16-247b(b) requires in part that:

> Each telephone company shall provide reasonable nondiscriminatory access and pricing to all telecommunications services, functions and unbundled network elements and any combination thereof necessary to provide telecommunications services to customers. . . .The rates for interconnection and unbundled network elements and any combination thereof shall be based on their respective forward looking long-run incremental costs, and shall be consistent with the provisions of 47 USC 252(d).

Conn. Gen. Stat. §16-247b complements the Telcom Act and FCC orders by separately providing the Department with the authority to require the unbundling of network elements. Therefore, the Department is not limited, nor do the Connecticut Statutes restrict the Department from requiring the unbundling of network elements based on the various telecommunications services offered by the ILEC.

4. Conclusion

a. Statutory Authority

The Telcom Act, Connecticut Statutes, FCC orders (specifically, the TRO) and court decisions provide the terms and conditions under which the Telco must provide access to UNEs or unbundle its telecommunications network to its competitors. The FCC has further refined those terms and conditions and developed a UNE list that identifies the minimum number of unbundled network elements that must be offered by the Telco to its competitors. The Telcom Act also provides the states with the independent authority to require unbundling beyond the list of UNEs approved by the FCC. The Connecticut Statutes have also provided the Department with the authority to require the unbundling of ILEC network elements.[96] In the opinion of the Department, unbundling of the Telco's HFC network is consistent with the Telcom Act because it accomplishes what that act intended to do, afford Gemini access to UNEs that it does not already possess in order to provide service offerings in direct competition with the incumbent LEC (i.e., the Telco).

This authority was recently reaffirmed by the FCC in the TRO.[97] In particular, the FCC noted that §251(d)(3) of the Telcom Act preserves the states' authority to establish

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[96] While Conn. Gen. Stat. §16-247b(a) requires that network elements that are necessary for the provision of telecommunications services, as discussed below, Gemini will be at a definite competitive disadvantage if access to the Telco's HFC network is denied. Beginning with the differences in network performance afforded to Gemini through the use of HFC facilities versus that provided over copper, Gemini would be unable to meet its business plan or offering of end to end communications to its customers. Additionally, the interconnection of Gemini's existing HFC Network is only possible with the Telco's existing HFC Network and not with the Company's twisted pair copper loop network, thus providing the kind of interoperability and open networks envisioned by the Connecticut statutes. Gemini Response to Interrogatory TELCO-4.

[97] TRO, ¶191.

unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Telcom Act and its purposes or the Commission's implementing regulations. Conn. Gen. Stat. §16-247b is consistent with that act. The FCC also noted that many states have exercised their authority under state law to add network elements to the national list.[98] More importantly however was the FCC's disagreement with incumbent LECs (specifically, SBC, the Telco's parent) who argued that the states are preempted from regulating in this area as a matter of law. According to the FCC, if Congress had intended to preempt the field, Congress would not have included §251(d)(3) in the Telcom Act.[99]

b. Used and Useful vs. Capable of Being Used

The Telco argument proffered in this proceeding against permitting the unbundling of the HFC network (because it was not used in the provision of telecommunications service) has been addressed in the Appellate Court and in the UNE Remand Order[100] and the TRO. For example, this argument was rejected by the United States Court of Appeals for the Fourth Circuit. See AT&T Communications of Va., Inc. v. Bell Atlantic – Va., Inc., 197 F.3d 663, 672 (4th Cir. 1999). In that proceeding, Bell Atlantic claimed that its equipment must be in actual use, and not merely capable of being used in order to qualify as a network element. In its opinion, the Fourth Circuit rejected that argument and held that such an interpretation placed undue weight on the word "used" and was contrary to the Supreme Court's acknowledgement that "network element" was broadly defined.

More importantly however was the FCC's determination that an element is subject to unbundling if it is already installed and called into service. Similar to the Fourth Circuit Court's finding noted above, the FCC, when addressing when a potential competitor is impaired without access to dedicated and shared transport, stated that:

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[98] Id.

[99] Id., ¶192 and fn. 609.

[100] The Telco and Gemini acknowledge that portions of the UNE Remand Order have been remanded to the FCC by the D.C. Circuit Court. (See USTA wherein the D.C. Circuit Court directed the FCC to re-examine certain issues pertaining to UNEs and one issue relating specifically to line sharing). The Telco also claims that the USTA order vacated the FCC's unbundling standards and without new standards, it would be difficult for the Department to justify that Gemini is impaired by its failure to gain access to the Company's coaxial distribution facilities. (Telco Reply Brief, p. 20). The Department disagrees with that conclusion. In USTA, the D.C. Circuit was very deliberate in vacating only that portion of the FCC's order pertaining to line sharing and not the necessary standard provided for in the UNE Remand Order.

> We reject incumbent LECs' arguments that because dark fiber is transport that is not currently "used" in the provision of a telecommunications service, within the meaning of section 153(29), it does not meet the statutory definition of a network element or the definition of interoffice transport. Rather, we agree with the Illinois Commission that the term "used in the provision of telecommunications service" in section 153(29) refers to network facilities or equipment that is "customarily employed for the purpose" of providing a telecommunications service. Although particular dark fiber facilities may not be "lit" they constitute network facilities dedicated for use in the provision of telecommunications service, as contemplated by the Act. Indeed, most other network elements have surplus capacity or can be upgraded to provide additional capacity and therefore are not always "currently used" as the term is interpreted by incumbent LECs. For example, switches, loops, and other network elements each may have spare, unused capacity, yet each meets the definition of a network element.
>
> We acknowledge that it would be problematic if some facilities that the incumbent LEC customarily uses to provide service were deemed to constitute network elements (e.g., unused copper wire stored in a spool in a warehouse). Defining such facilities as network elements would read the "used in the provision" language of section 153(29) too broadly. Dark fiber, however, is distinguishable from this situation in that it is physically connected to the incumbent's network and is easily called into service. Thus, as indicated above, we conclude that dark fiber falls within the statutory definition of a network element.[101]

The FCC's recent clarification of network elements relative to "used vs. capable of being used" analysis is instructive to this proceeding as well.[102] Specifically, the FCC requirement that unbundled access to network elements that are "capable of being used" be provided to competitors. In the instant case, the Telco HFC network has already been deployed and could be placed into service by Gemini. Gemini has committed, most recently in its September 26, 2003 Reply Comments, to providing voice-grade narrowband services, including POTS, over the HFC network.[103] In light of the TRO, the Department finds that the HFC network while actually not being used to provide telecommunications services, was constructed in part and intended by the Company to provide a full complement of voice data and video services. In the opinion of the Department, the capability existed for provision of those services and as such, the HFC network should be unbundled. The Department also finds that based on 47 U.S.C. 153(29) the HFC network meets the definition of a "network element," and therefore it must be unbundled. Accordingly, the Department is not persuaded by the Company's

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[101] UNE Remand Order, ¶¶327 and 328.

[102] TRO, ¶¶59 and 60.

[103] See also the September 28, 2001 Decision in Docket No. 01-06-22, wherein Gemini was authorized by the Department to offer retail facilities-based and resold local exchange telecommunications services throughout Connecticut. Specifically, Gemini has been permitted to offer local exchange flat rate, measured rate, operator access, residential custom and class features, basic business exchange services, intrastate toll, directory assistance, residential ancillary and operator services to business and residential customers throughout Connecticut. Docket No. 01-06-22 Decision, pp. 1 and 2.

argument that it is not required to make available unbundled access to these facilities because Gemini will only be offering broadband services. Gemini has committed to offering the FCC's qualifying telecommunications services over that network, and in accordance with the TRO, other services (e.g., broadband) may also be offered.

The FCC has also considered the effect of alternatives to mandating unbundled access to the hybrid loops of ILECs. Specifically, whether unbundled access to subloops, spare copper loops, and the nonpacketized portion of ILEC hybrid loops, as well as remote terminal collocation, offer suitable alternatives to an intrusive unbundling approach.[104] Relative to the Petition, Gemini has requested unbundled access to the coaxial portion of the loop and the electronics related to that plant.[105] The Telco HFC network and hybrid facilities differ from those addressed by the FCC in the TRO. In comparing the Petition for access to HFC network components to those considered by the FCC in the TRO, they appear to be analogous. That is, the hybrid loop components that the FCC has required be unbundled are equivalent to those in the HFC network that Gemini has sought access to in the Petition in support of its provision of narrowband services. Therefore, these components should be unbundled.

The Telco also argues that even if the Department had the additional authority to unbundle the Company's coaxial distribution facilities, such action would be inconsistent with or conflict with the TRO.[106] According to the Telco, the FCC conclusion regarding hybrid loops and an ILEC's unbundling obligations for a CLEC's deployment of broadband service supports the Telco's position that it cannot be obligated to unbundle those coaxial facilities.[107] The Department disagrees. The Telco's HFC network is unique. Additionally, while the TRO did not specifically address the network facilities that are the subject of this proceeding, the FCC crafted this order in part, to reflect the intent of the Congress and the Telcom Act. In particular, the recognition of market barriers to entry faced by new entrants as well as the societal costs of unbundling. Indeed, the FCC correctly established a regulatory foundation that seeks to ensure that investment in telecommunications infrastructure will generate substantial, long term benefit for all consumers.[108]

Connecticut has before it a competitive service provider that is willing to invest in the state's telecommunications infrastructure, a portion of which has been abandoned by the Telco. Gemini has not only committed to investing in that network, but has also committed to offering a full panoply of telecommunications services to consumers. In the opinion of the Department, access to the HFC network by Gemini will meet the Telcom Act and FCC pro-competitive goals (as well as those outlined in Conn. Gen. Stat. §16-247a) by providing for increased competition in the Connecticut local exchange service market. Unbundling of the HFC network will encourage the deployment of advanced facilities by Gemini as evidenced by its commitment to invest in that network.

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[104] TRO, ¶199.
[105] Gemini September 12, 2003 Written Comments, pp. 17 and 18.
[106] Telco September 26, 2003 Written Comments, pp. 22-26.
[107] Id., p. 23.
[108] TRO, ¶5.

Regarding the used and useful requirements of the Telcom Act and Connecticut Statutes, federal and state law require that Gemini be afforded access to the Telco's network and UNEs. Although the HFC network did not develop in the manner envisioned by the Company, it was intended to provide voice services, and therefore, capable of providing telecommunications services. If deployment of the I-SNET network had occurred as intended, the Company would have been well on its way to offering telecommunications services over the HFC network. The Telco's deployment of that network began prior to implementation of the Telcom Act and subsequent FCC orders and Connecticut Statutes, and as such, the Company would most likely have been required to permit competitors unbundled access to that network if it were fully functional today.

The Telco argues that the coaxial cable facilities at issue in this proceeding are not a network element that the Company is obligated to unbundle.[109] Citing the TRO, the Telco maintains that these facilities do not constitute a network element because they are neither a part of the Company's network nor capable of being used to provide a telecommunications service without significant modifications that go beyond those the FCC has required ILECs to make in the provision of UNEs.[110] The Telco also argues that the FCC declined to require incumbent LECs to provide unbundled access to their hybrid loops for the provision of broadband services. According to the Telco, the FCC found that ILECs are not required to unbundle their next generation network, packetized capability of their hybrid loops to enable requesting carriers to provide broadband services to the mass market.[111]

The Department disagrees with the Telco for a number of reasons. First and foremost, the Department has already determined that the HFC network is a network element that should be unbundled. Secondly, the FCC has required incumbent LECs to make routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facility has already been constructed and does not include the construction of new wires. Additionally, the FCC has addressed loop facilities and deployment in the TRO. Specifically, the FCC has required that loops consisting of either all copper or hybrid copper/fiber facilities must be provided on an unbundled basis so that requesting carriers may provide narrowband services over those facilities. In the instant case, Gemini has committed to offering the FCC's qualifying services over facilities that have been abandoned by the Telco.[112] The FCC also required ILECs to continue to provide unbundled access to the TDM features, functions, and capabilities of their hybrid loops. According to the FCC, this would allow CLECs to continue to provide traditional narrowband services and high capacity services like DS1 and DS3 circuits.[113]

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[109] See the Telco's September 26, 2003 Reply Comments pp.13-18.

[110] Id., p. 13.

[111] Telco September 26, 2003 Reply Comments, pp. 23 and 24.

[112] Throughout the Company's September 26, 2003 Reply Comments, the Telco maintains that Gemini is prohibited from offering "broadband" services over its HFC network. (See for example, those comments, pp. 24, 25 (and fn. 63) and 26. The Department notes that the Company in these discussions fails to acknowledge Gemini's commitment and that the FCC has permitted the offering of such services which may be combined with broadband-type services in order to offer subscribers a full complement of telecommunications and information services. TRO, ¶¶143 and 146.

[113] Id., ¶199, fn. 627.

While the TRO does not address the unique circumstances of the HFC network, the FCC recognizes that its obligation to encourage infrastructure investment tied to legacy loops is more squarely driven by facilitating competition and promoting innovation. Because incumbent LECs have already made the most significant infrastructure investment, the FCC has sought to encourage both intramodal and intermodal carriers (in addition to ILECs) to enter the broadband mass market and make infrastructure investments in equipment. The FCC also expects that more innovative products and services will follow the deployment of new loop plant and associated equipment.[114] In light of the above, the Department reaffirms its conclusion that the HFC network should be unbundled.

As long as Gemini offers the FCC's qualifying services, the Telco's HFC network must be unbundled. Accordingly, the Telco's argument that facilities or network elements must be used for telecommunications services before they can be unbundled is hereby dismissed. Although the Telco's HFC network is currently in a state of disrepair, the Department expects that the Company will, as required by the TRO, take the necessary actions required to afford access to those facilities sought by its competitors. The Department also finds that Gemini has committed to performing the necessary upgrades and repair to the HFC network to accommodate its provision of qualifying services. Consequently the Telco's concern that the HFC network is not capable of providing telecommunications services without significant modification is also without merit.

c. Necessary and Impairment Standard

i. Is Access to the HFC Network Necessary?

The Telco argues that §251(d)(2) of the Telcom Act requires the consideration of whether a network element is necessary and whether the failure to allow access to that element would impair Gemini's ability to provide the services it seeks to offer.[115] The Telco further claims that the Department must determine that access to the facilities is necessary and that failure to provide access would impair the ability of the telecommunications carrier to provide the services it seeks to offer.[116] The Telco maintains that Gemini will not be impaired without access to the Company's HFC network nor can Gemini demonstrate that such access is required by §251(d)(2) of the Telcom Act.[117]

The Department disagrees. First, the FCC has determined that the "necessary standard" applies only to proprietary network elements. Additionally, the FCC adopted standards that aid in the determination of whether a network element is proprietary in nature. Specifically, the FCC determined that (footnotes omitted):

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[114] TRO, ¶244.
[115] Telco Brief, p. 20.
[116] Telco Reply Brief, p. 6.
[117] Id., pp. 20-24.

> We find that if an incumbent LEC can demonstrate that it has invested resources (time, material, or personnel) to develop proprietary information or network elements that are protected by patent, copyright, or trade secret law, the product of such an investment is "proprietary in nature" within the meaning of section 251(d)(2)(A). This definition is consistent with the 1996 Act's policy of preserving the incumbent LECs' innovation incentives. It is also consistent with the Commission's conclusion, in the *Local Competition First Report and Order*, that in some instances it will be "necessary" for new entrants to obtain access to proprietary elements. Finally, our decision to define interests that are "proprietary in nature" along established intellectual property categories is consistent with the Department of Justice and Federal Trade Commission "Guidelines for the Licensing of Intellectual Property."[118]

The FCC reaffirmed this determination even though it had sought comment on whether to change that interpretation of "necessary" established in the UNE Remand Order. According to the FCC, it declined to make that change. The FCC states that the D.C. Circuit Court did not remand that issue back to the Commission, vacate the necessary standard nor did it instruct the FCC to consider it further.[119]

The Department does not believe that the "necessary standard" applies because, throughout this proceeding, the Company has argued that the HFC network has been abandoned,[120] and therefore, it is not proprietary. Nor has the Telco offered evidence meeting the criteria established in the UNE Remand Order.[121] Finally, relative to Conn. Gen. Stat. §16-247b(b), the Department finds that Gemini has presented significant evidence supporting its request that the HFC network be unbundled because it is necessary in the provision of the FCC's qualifying services. Specifically, the Telco HFC network offers Gemini an architecture that is more advanced and efficient than that of the Company's existing copper twisted pair. Gemini's access to the HFC network is also necessary because otherwise, it would be required to replicate an existing network, in direct conflict with Conn. Gen. Stat. §16-247a(5). Accordingly, the Department finds that the HFC Network is not subject to the "necessary standard," and meets the requirements of the Connecticut statutes.

ii. Impairment Standard

The FCC addressed the shortcomings of the UNE Remand Order's "impairment" standard raised by the DC Circuit Court in the TRO.[122] Specifically, the FCC has interpreted the language, structure, purposes, and history of the impair standard in a manner that is faithful to the Telcom Act and Congress' intent, that responds fully to the

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[118] UNE Remand Order, ¶¶ 35 and 36.

[119] TRO, ¶171.

[120] See for example the Telco's January 21, 2003 Motion to Dismiss the Petition Filed by Gemini Networks CT, Inc. or, in the Alternative, Motion to Stay and/or Bifurcate Issues and Request for Procedural Order, p. 3.

[121] Specifically, the Company did not demonstrate that it has invested resources to develop proprietary information or network elements that are protected by patent, copyright or trade secret law. UNE Remand Order, ¶35.

[122] TRO, ¶¶61-169.

courts and is economically rationale.[123] According to the FCC, it has been "instructed" by the Telcom Act to consider whether the failure to provide access to network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.[124] Consequently, it has fashioned its "impairment standard" based on that instruction.[125] In light of the TRO and the Telcom Act, the Department, as the following analysis illustrates, has relied on the TRO in its determination as to whether Gemini would be impaired without access to the Telco's HFC network.

The FCC has identified a number of "barriers to entry" that could cause impairment to prospective competitors entering a market. In the opinion of the Department, these "barriers" go directly to the heart of the Petition, and satisfy the Telcom Act's impairment standard. In particular, the FCC has determined that a requesting carrier would be impaired when lack of access to an incumbent LEC network element posed a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.[126] Relative to the instant case, Gemini could be impaired operationally if it were required to purchase network facilities that it deems are inferior to that of the HFC network.[127] Likewise, Gemini could be impaired economically[128] if it were required to construct its own facilities.[129] Gemini also, in light of the TRO, experiences "first-mover advantage" barriers to entry.[130] In this instance, Gemini is subjected to this barrier to entry because the Telco has experienced preferential access to rights-of-way, and possesses sunken capacity, and operational difficulties[131] that have already been addressed when it constructed its HFC network as a monopolist.[132] Gemini also suffers from brand name preference[133] (another first-mover advantage barrier) that the Telco currently enjoys.[134] Gemini would also be at a disadvantage in constructing its own network relative to the Telco because the Company was able to construct its HFC network with revenues generated from its monopoly customers.[135] A related issue are the costs that Gemini would incur in securing pole attachment licenses from the Telco for its own network in

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123 Id., ¶69.

124 Id., ¶71.

125 Id.

126 TRO, ¶84.

127 Gemini Response to TELCO-4, p. 3.

128 Id.

129 The FCC has committed to considering business cases analyses if they provide evidence at a granular level concerning the ability of competitors economically to service the market without the UNE in question. Id., ¶99.

130 Gemini September 12, 2003 Written Comments, pp. 8 and 9.

131 Id., p. 8.

132 TRO, ¶89.

133 Gemini September 12, 2003 Written Comments, p. 9.

134 TRO, ¶89.

135 Gemini September 12, 2003 Written Comments, p. 7. Related to this issue is the capital requirements barrier. In this case, some entrants are at a disadvantage when compared to the incumbents when raising large amounts of capital. TRO, fn. 248. The FCC cites as three possible reasons: entrants are a riskier investment, small entrants face higher transaction costs to raise funds, and the capital market is imperfect such that large firms have more market power to obtain loans at favorable rates. Id. In comparing the Telco (and its parent, SBC) to Gemini, the Department concludes that Gemini would likewise experience impairment from this barrier to entry.

the event access to the Telco's HFC network is prohibited.[136] Specifically, Gemini would unnecessarily experience make ready costs to either remove the Telco's existing facilities from its utility poles or replace those poles in their entirety to accommodate the addition of Gemini's facilities. In the opinion of the Department, the associated costs of this activity make market entry for Gemini uneconomical.

The Department also believes that the Telco's imposition of its existing services and requirement that Gemini utilize those services instead of the facilities that Gemini has sought in the Petition would seriously harm, if not destroy, Gemini's business plan and business.[137] Gemini has implemented a technical plan that relies in part, and complements the Company's HFC network. To require Gemini to utilize UNEs other than the HFC network conflicts with the FCC's finding that lack of access to an ILEC incumbent network element would make entry into a market uneconomic.[138] Acceptance of the Company's other services as a means of offering its own services would require Gemini to construct a duplicate network and would also conflict with Conn. Gen. Stat. §16-247a(5)).

Gemini has expressed a need for certain facilities that offer the functions and features that can be provided from the HFC network. Only the Telco's HFC network facilities (together with its requirement that it make those facilities available to its competitors) can satisfy those service needs. Gemini argues that the provision of telecommunications services over the HFC network is far superior in speed and consistency than over the existing copper network, based on its own experience operating its HFC network. The Department accepts that argument. While the Telco was unable to successfully utilize the HFC network, Gemini believes that it possesses a business plan that can make that network useful. For example, Gemini claims that its HFC-based architecture is faster and provides more consistent speeds for data transmission that do not occur over a twisted copper network.[139] Acceptance of the Telco's proposed alternative UNEs would, in the opinion of Gemini, force an architecture consisting of technologically inferior facilities.[140] Therefore the Department concludes that given the timing of the Petition, the type of Gemini's network architecture should not be considered a factor against requiring the unbundling of the Telco's HFC network.

Moreover, the Department finds that the FCC has declined to accept the SBC argument that requesting carriers are not necessarily impaired if they can use ILEC resold or retail tariffed services to provide their retail services.[141] The FCC concluded that it would be inconsistent with the Telcom Act if it permitted the ILEC to avoid all unbundling merely by providing resold or tariffed services as an alternative. The FCC also determined that such an approach would give the ILEC unilateral power to avoid unbundling at long run incremental rates simply by voluntarily making elements available at some higher price. Lastly, the FCC concluded that forcing requesting

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[136] Gemini Response to TELCO-4, p. 3; Gemini September 12, 2003 Written Comments, p. 8.
[137] Gemini Response to Interrogatory TELCO-4, p. 2.
[138] TRO, ¶84.
[139] Gemini Response to Interrogatory TELCO-4, p. 2.
[140] Id.
[141] TRO, ¶102.

carriers to rely on tariffed offerings would place too much control in the hands of the ILECs, which could subsequently alter their tariffs and thereby engage in a vertical price squeeze.[142] The Department finds that requiring Gemini to utilize Telco facilities/services other than those sought in the Petition, would impair Gemini's entry into the market and its service offering to consumers and conflict with the TRO.[143]

D. HFC NETWORK DISPOSITION PLAN

The OCC protested the Telco's removal of portions of the HFC network without notice, subsequent to SPV's market withdrawal.[144] The OCC alleges that the Telco's removal of any HFC facilities is contrary to the Department's express directive that those assets be preserved to foster future competitive market entry by other service providers.[145] The OCC also objected to the Telco's claim that it cannot now offer access to HFC network elements because they have been removed or are so disjointed as to preclude connectivity via a lease arrangement.[146] Moreover, the OCC criticizes the Telco's record keeping practices associated with the removed HFC plant, as well as the Company's claim that the Department ceded jurisdiction over those assets by directing the Telco to assign associated costs to shareholders.[147]

In Docket No. 00-08-14, the Telco expressed a willingness to assist in developing a network transport arrangement for a potential cable provider, using all or portions of the HFC network, and the Department strongly encouraged the Telco to work with prospective video services providers to achieve that goal.[148] Nevertheless, to ensure that the Telco undertook no action with respect to disposition of any piece of the HFC network or assets that may be subject to a claim that the Company was thwarting competition, the Department ordered the Company to develop an organized disposition plan. The disposition plan was subsequently filed with and approved by the Department.[149]

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[142] Id.

[143] The Telco argues that based on binding federal court and FCC decisions, the Department may not employ individualized or business-specific impairment analysis. The Telco also argues that the Department does not have the discretion to ignore the D.C. Circuit Court's USTA decision and the FCC's conclusions in the TRO on this very issue. Telco Written Exceptions, p. 29. The Department is not persuaded by the Telco's argument. The FCC has indicated that it would consider various evidence as part of its impairment analysis. Specifically, the FCC indicated that it would give consideration to cost studies, *business case analyses*, and modeling if they provide evidence at a granular level concerning the ability of competitors economically to serve the market without the UNE in question (emphasis added). TRO, ¶99. In light of that discussion, it is clear to the Department that individual business cases may hold some weight in an impairment analysis and not be totally rejected as alleged by the Telco. As indicated above, Gemini has presented strong evidence (in addition to a business case analysis) that it would be impaired without access to the Telco HFC network. In the opinion of the Department, while Gemini has provided convincing evidence of impairment, its business case merely adds more weight to that finding; and therefore, the Telco's argument is dismissed.

[144] OCC Brief, pp. 12 and 13.

[145] Id.

[146] Id., p. 12.

[147] Id., pp. 12 and 13.

[148] Relinquishment Decision, pp. 23 and 24.

[149] Filings dated May 1, 2001, and September 1, 2001, in response to Order Nos. 1 and 2 in Docket No. 00-08-14.

From the time SPV ceased providing service in June 2001, miles of coaxial plant have lain idle. Since then, the Telco has removed coaxial distribution facilities and continues to dispose of them as conditions dictate. For example, during certain road construction projects, and in the case of plant damage and other situations, the Telco has removed and not replaced certain coaxial facilities because they were no longer in use. The Telco explains that if those coaxial distribution facilities were part of the Company's network, it would not be disposing of them.[150]

The Telco's removal of portions of the HFC network including coaxial plant since SPV's demise is not revelatory for the Department. The Telco's decision to not restore or replace unused coaxial plant damaged by storms, motor vehicle accidents, or otherwise abandoned when poles must be shifted is pragmatic and cost-effective. While the Department remains focused on fostering an environment conducive to market entry by a successor competitive cable operator, it would be unwise to require the Telco to continue to maintain and replace unused coaxial plant in perpetuity, or to require the Company to maintain and replace unused plant in the same manner in which it maintains and replaces its used plant. No evidence was presented in this proceeding that the Telco's removal of coaxial facilities was an attempt to thwart competition or impair network connectivity for a subsequent service provider. Additionally, removal of such unused plant typically does not invoke the same level of record keeping and network mapping that would be expected of the Company's energized network.

E. TELCO AND GEMINI INTERCONNECTION AGREEMENT

In the November 3, 2003 Draft Decision (Draft Decision) after concluding that the HFC network was capable of, and should be unbundled, the Department also required that the Telco: (1) provide Gemini with an inventory of the existing HFC network components by February 1, 2004;[151] (2) develop a total service long run incremental cost of service study to cost and price the HFC network UNEs in accordance with established Department requirements (TSLRIC); and (3) locate and engage a vendor that would be responsible for developing an HFC network OSS.[152]

The Telco claims and Gemini has agreed,[153] that the Department may have exceeded the provisions of its February 10, 2003 response to the Telco Request (i.e., whether the HFC network was subject to unbundling pursuant to Conn. Gen. Stat. §16-247b(a) and once such a determination was made, whether these network facilities could be subject to arbitration as provided for by §252 of the Telcom Act).[154] The Telco also maintains that before the Company can be required to provide an unbundled

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[150] Telco Brief, p. 11.

[151] The Department further required that the Telco and Gemini share in the cost of developing the HFC network inventory. However, during Oral Argument, Gemini noted that SPV had filed a network inventory on May 1, 2001, in compliance with the Decision in Docket No. 00-08-14. While recognizing that some of the HFC network plant has been removed since the Telco's compliance filing, Gemini is of the opinion that the amount of plant removed is minimal and is willing to accept the May 1, 2001 filing thus negating the need for the Telco to conduct another inventory. Tr.12/10/03, pp. 56-59.

[152] Draft Decision, pp. 44 and 45, 49 and 50.

[153] See for example, Tr. 12/10/03, pp. 42 and 43, 49 and 50.

[154] Department February 10, 2003 Letter to Attorneys Garber and Janelle, p. 4.

network element, the Department must first require Gemini to negotiate an interconnection agreement.[155] The Department agrees.

Sections 251 and 252 of the Telcom Act and Conn. Gen. Stat. §16-247b(a) provide the terms and conditions for the unbundling of incumbent UNEs, the interconnection of ILEC and CLEC networks, and the procedures under which access to those networks should be negotiated. In the event that those negotiations are unsuccessful, §252 of the Telcom Act also provides the procedures the parties must follow when seeking arbitration before state commissions. As the Department has determined that the HFC network is subject to unbundling, Congress has imposed on the ILEC (i.e., the Telco), the duty to negotiate in good faith, an interconnection agreement that would provide Gemini access to those network elements.[156]

Therefore, Gemini and the Telco must negotiate an interconnection agreement that would provide access to the HFC network. The Department expects the parties to address costing and pricing of the HFC UNEs (i.e., that it is conducted in accordance with federal and state law) and the development of HFC network OSS as part of those negotiations. In order to ensure that negotiations proceed in a timely fashion, Gemini and the Telco will be required to present to the Department, a proposed time schedule listing the dates of each negotiation session and the expected topic(s) that are to be addressed during that session. Additionally, the Department will require that at the conclusion of each session, the Telco and Gemini to file a brief summary of each negotiating session and whether the issue(s) negotiated during that session were resolved.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Gemini has requested the Department issue a Declaratory Ruling finding that certain HFC facilities owned by the Telco constitute UNEs and as such, must be tariffed and offered on an element by element basis at TSLRIC pricing.

2. This proceeding has been bifurcated to address the legal issues during this phase.

3. On December 29, 1994, as revised on April 11, 1995, the Telco filed its I-SNET Technology Plan with the Department.

4. The intent of I-SNET was to be a full service network that would provide a full suite of voice, data and video services.

5. The goal of I-SNET was to transform Connecticut's existing infrastructure into a robust, multifunctional core capable of supporting a variety of information, communications and entertainment applications.

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[155] Telco Written Exceptions, pp. 52-54.
[156] Section 251(c)(1) of the Telcom Act.

6. I-SNET was intended to supersede the Company's existing infrastructure and address the state's emerging, broadband, communications requirements.

7. With the complete deployment of I-SNET, the Company expected its telecommunications infrastructure to transform to an end-to-end broadband network, capable of providing full service network capabilities to all Connecticut subscribers.

8. The Department has determined that it was in the public interest that the Telco be afforded the opportunity to provide business and residential customers the benefits of new telecommunications technologies.

9. The Department permitted the Company to include for purposes of depreciation, an allowance for the plant that would be retired due to the I-SNET deployment. This allowance would subsequently be recovered from the Telco's customers.

10. The Department determined that the Telco would, through the implementation of I-SNET improve productivity and control costs while maintaining the quality of service necessary to retain existing customers and attract new ones.

11. As part of the Telco's approved Alt Reg Plan, the Department employed the Company's service standard objectives in place at that time as a starting point, and over the course of the Alt Reg Plan, increased the minimum objectives based in part on the Telco's expected improvement in service quality resulting from its infrastructure modernization plan.

12. Beginning in 1996 many large telecommunications companies began to retreat from HFC leading to Lucent's abandonment of the HFC technology; however, the Telco decided to continue to deploy the HFC technology.

13. Presently, no incumbent local telephone company, including the Telco, offers both telephony and CATV services over an HFC network.

14. The Company did not identify or differentiate the facilities that would be used for telecommunications services (i.e., voice and data) and those that would be used to support the offering of CATV services in its I-SNET plan.

15. Based on the intended use of the HFC network, the Telco sought, and was granted favorable regulatory treatment relative to depreciation and alternative regulation.

16. As a result of the Telcom Act and Connecticut Public Acts 94-83 and 99-122, certain responsibilities and obligations have been imposed on the Telco in order to promote telecommunications competition in the state.

17. The Telcom Act requires the ILECs to make available to CLECs, access to UNEs at reasonable, nondiscriminatory terms and conditions.

18. The FCC concluded that access to an UNE refers to the means by which requesting carriers obtain an element's functionality in order to provide a telecommunications service.

19. The FCC has determined that an ILEC's duty to provide access constitutes a duty to provide a connection to a network element independent of any duty imposed by §251(c)(2) of the Telcom Act and that such access must be provided under the rates, terms, and conditions that apply to unbundled elements.

20. Section 251(d(3) of the Telcom Act provides the Department the independent authority it requires to direct the unbundling of ILEC network elements.

21. The FCC reaffirmed its definition of a network element as requiring ILECs to make available to requesting carriers network elements that are capable of being used in the provision of a telecommunications service.

22. The purpose of the Telcom Act supports requiring incumbent LECs to provide access to network elements to the extent those elements are capable of being used by the requesting carrier in the provision of a telecommunications service.

23. A network element is a facility or equipment used in the provision of a telecommunications service and includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

24. In order to gain access to UNEs, carriers must provide qualifying services using the UNEs to which they seek access.

25. Qualifying services are defined as those telecommunications services that are offered by requesting carriers in competition with those that have been traditionally the exclusive or primary domain of the ILECs (e.g., local exchange service, such as POTS and access services, such as xDSL and high capacity circuits).

26. Once a requesting carrier has obtained access to a UNE in order to provide a qualifying service, the carrier may use that UNE to provide any additional services, including non-qualifying telecommunications and information services.

27. Allowing requesting carriers to use UNEs to provide multiple services on the condition that they are also used to provide qualifying services will permit carriers to create a package of local, long distance, international, information, and other services tailored to the customer.

28. Gemini has committed to offering qualifying telecommunications services over the HFC network.

29. Loops consisting of either all copper of hybrid copper/fiber facilities must be provided on an unbundled basis so that requesting carriers may provide narrowband services over those facilities.

30. The FCC has recognized its obligation to encourage infrastructure investment tied to legacy loops is more squarely driven by facilitating competition and promoting innovation.

31. Gemini has committed to performing the necessary upgrades and repair to the HFC network to accommodate its provision of qualifying services.

32. The "necessary standard" applies only to proprietary network elements.

33. An ILEC's failure to provide access to a network element would impair the ability of a requesting carrier to provide the services it seeks to offer if, after taking into consideration the availability of alternative elements outside of the incumbent's network, lack of access to that element diminishes a requesting carrier's ability to provide its services.

34. The FCC has identified a number of "barriers to entry" that could cause impairment to prospective competitors entering a market.

35. A requesting carrier would be impaired when lack of access to an incumbent LEC network element posed a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.

36. The FCC has declined to accept the SBC argument proffered during the Triennial Review Proceeding that requesting carriers are not necessarily impaired if they can use ILEC resold or retail tariffed services to provide their retail services.

37. The FCC concluded that it would be inconsistent with the Telcom Act if it permitted the ILEC to avoid all unbundling merely by providing resold or tariffed services as an alternative because it would give the ILEC unilateral power to avoid unbundling at long run incremental rates simply by voluntarily making elements available at some higher price.

38. The FCC concluded that forcing requesting carriers to rely on tariffed offerings would place too much control in the hands of the ILECs, which could subsequently alter their tariffs and thereby engage in a vertical price squeeze.

39. Requiring Gemini to utilize Telco facilities/services other than those sought in the Petition, could impair Gemini's entry into the market and its service offering to customers and conflict with the TRO.

40. Sections 251 and 252 of the Telcom Act and Conn. Gen. Stat. §16-247b(a) provide the terms and conditions for interconnection of ILEC and CLEC networks and the procedures under which access to those networks are to be negotiated. In the event that negotiations are unsuccessful, §252 of the Telcom Act provides

the procedures under which the parties may seek arbitration before the state commissions.

41. Gemini and the Telco must negotiate an interconnection agreement that would provide Gemini access to the Telco's HFC network and unbundled network elements.

VI. CONCLUSION AND ORDERS

A. CONCLUSION

I-SNET was originally deployed to provide the Telco with a full complement of narrowband and broadband services (i.e., voice, data and video). In light of 47 U.S.C. §153(29), the Telco's HFC network meets the definition of a network element. Although the federal requirements relative to meeting the "necessary" standard do not apply, Gemini has satisfactorily demonstrated that access to the Telco's HFC network is necessary for the provision of its own services pursuant to Conn. Gen. Stat. §16-247b(b). Additionally, Gemini will be impaired as it will experience a number of barriers to entry as identified by the FCC in the TRO. Therefore, the Telco's HFC network is capable of providing telecommunications services and for purposes of this proceeding, is subject to the federal and state unbundling requirements. Unbundling that network is consistent with the Telcom Act because it accomplishes what that act intended to do, afford Gemini access to UNEs that it does not already possess in order to provide service offerings in direct competition with the incumbent LEC (i.e., the Telco). Accordingly, the Telco's HFC network should be unbundled in accordance with the orders listed below. In order for Gemini to gain access to the unbundled HFC network, it should negotiate an interconnection agreement with the Telco pursuant to §252 of the Telcom Act.

B. ORDERS

For the following Orders, please submit an original and 3 copies of the requested material, identified by Docket Number, Title and Order Number to the Executive Secretary.

1. No later than January 30, 2004, the Telco and Gemini shall file with the Department, a proposed time schedule listing the dates of the negotiation sessions and the expected topic(s) that are to be addressed during each session.

2. No later than five business days following the conclusion of each negotiation session, the Telco and Gemini shall file a brief summary indicating the topics covered and the issue(s) resolved, if any during that session.

DOCKET NO. 03-01-02 PETITION OF GEMINI NETWORKS CT, INC. FOR A DECLARATORY RULING REGARDING THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY'S UNBUNDLED NETWORK ELEMENTS

This Decision is adopted by the following Commissioners:

Jack R. Goldberg

John W. Betkoski, III

Donald W. Downes

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control

DEC 18 2003
Date